

83-164

Grand Jurors Court, U.S.

F. I. E. D.

AUG 23 1983

ALEXANDER L. STEVAS,  
CLERK.

No. \_\_\_\_\_

IN THE

**Supreme Court of the United States**

October Term, 1983

STANLEY ZAITCHICK and VICTORIA ZAITCHICK,

*Respondents,*

vs.

AMERICAN MOTORISTS INSURANCE COMPANY,

*Petitioner.*

**BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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Respondents accept without change  
the "QUESTION PRESENTED", the "STATEMENT OF THE  
CASE" and the Appendices printed in the Peti-  
tion of the Petitioner herein.

## REASONS FOR DENYING THE WRIT

### A. Conflict Among Circuits is Not Alone a Controlling Factor.

The case at bar involves an interpretation of a particular clause in an insurance policy, to wit, a replacement cost provision. The controlling law regarding conflicts between circuits in such a matter appears to be set forth in the case of Ruhlin et al v New York Life Insurance Co., 304 U. S. 202 (3rd Circuit, 1938)

wherein Mr. Justice Reed stated:

"The decision in Erie Railroad Co. v Tompkins, ante p. 64, goes further, and settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court....As to questions controlled by state law, however conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.'

No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest Court of the State."

It is apparent from the Court of Appeals decision affirming the District Court that New York law was followed and applied (Court of Appeals Decision Affirming District Court, Appendix A page 2A, Paragraph 1, of Petition herein).

1. Appellant's claim that appellees must rebuild their house before they may recover replacement cost under the policy is without merit. Judge Duffy correctly concluded that under New York law American's repudiation of liability operated as a breach of the insurance contract. Michael Delivery of Buffalo, Inc. v. Firemen's Fund Ins. Co., 115 Misc.2d 934 (Sup. Ct. 1982).

Nor has the petition attempted to show that the Circuit Court of Appeals has decided an impor-

tant question of local law in a way probably in conflict with applicable local decisions or that the decision was probably untenable.

B. The Supreme Court is Not the Place to Review a Conflict Concerning Evidentiary Matter.

It has been held in National Labor Relations Board v Pittsburgh Steamship Co., 340 U. S. 498 (1951) that the Supreme Court of the Unites States

"is not the place to review a conflict of evidence or to reverse a Court of Appeals, 'because' were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony....In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Commission v American Tobacco Co., 274 U. S. 543, 544."

That the Circuit Court of Appeals considered all of the evidence and circumstances is evident from a reading of numbered paragraph 3 of its decision Appendix A page 3a of Petition, wherein the Court stated:

"Moreover, assuming arguendo actual cash value is the proper measure of recovery, there was sufficient evidence to support the award of damages."

#### CONCLUSION

For the reasons set forth above, the respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted

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